

§ 2.126 [Reserved]**§ 2.127 Motions.**

(a) Every motion shall be made in writing, shall contain a full statement of the grounds, and shall embody or be accompanied by a brief. A brief in response to a motion shall be filed within fifteen days from the date of service of the motion unless another time is specified by the Trademark Trial and Appeal Board or the time is extended by order of the Board on motion for good cause. When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded. An oral hearing will not be held on a motion except on order by the Board.

(b) Any request for reconsideration or modification of an order or decision issued on a motion must be filed within thirty days from the date thereof. A brief in response must be filed within fifteen days from the date of service of the request.

(c) Interlocutory motions, requests, and other matters not actually or potentially dispositive of a proceeding may be acted upon by a single Member of the Trademark Trial and Appeal Board or by an Attorney-Examiner of the Board to whom authority so to act has been delegated.

(d) When any party files a motion to dismiss, or a motion for judgment on the pleadings, or a motion for summary judgment, or any other motion which is potentially dispositive of a proceeding, the case will be suspended by the Trademark Trial and Appeal Board with respect to all matters not germane to the motion and no party should file any paper which is not germane to the motion. If the case is not disposed of as a result of the motion, proceedings will be resumed pursuant to an order of the Board when the motion is decided.

(e)(1) A motion for summary judgment should be filed prior to the commencement of the first testimony period, as originally set or as reset, and the Trademark Trial and Appeal Board, in its discretion, may deny as untimely any motion for summary judgment filed thereafter.

(2) For purposes of summary judgment only, a discovery deposition, or an answer to an interrogatory, or a

document or thing produced in response to a request for production, or an admission to a request for admission, will be considered by the Trademark Trial and Appeal Board if any party files, with the party's brief on the summary judgment motion, the deposition or any part thereof with any exhibit to the part that is filed, or a copy of the interrogatory and answer thereto with any exhibit made part of the answer, or a copy of the request for production and the documents or things produced in response thereto, or a copy of the request for admission and any exhibit thereto and the admission (or a statement that the party from which an admission was requested failed to respond thereto).

(f) The Board does not have authority to hold any person in contempt, or to award attorneys' fees or other expenses to any party.

[48 FR 23140, May 23, 1983, as amended at 54 FR 34900, Aug. 22, 1989]

§ 2.128 Briefs at final hearing.

(a)(1) The brief of the party in the position of plaintiff shall be due not later than sixty days after the date set for the close of rebuttal testimony. The brief of the party in the position of defendant, if filed, shall be due not later than thirty days after the due date of the first brief. A reply brief by the party in the position of plaintiff, if filed, shall be due not later than fifteen days after the due date of the defendant's brief.

(2) When there is a counterclaim, or when proceedings have been consolidated and one party is in the position of plaintiff in one of the involved proceedings and in the position of defendant in another of the involved proceedings, or when there is an interference or a concurrent use registration proceeding involving more than two parties, the Trademark Trial and Appeal Board will set the due dates for the filing of the main brief, and the answering brief, and the rebuttal brief by the parties.

(3) When a party in the position of plaintiff fails to file a main brief, an order may be issued allowing plaintiff until a set time, not less than fifteen days, in which to show cause why the Board should not treat such failure as

a concession of the case. If plaintiff fails to file a response to the order, or files a response indicating that he has lost interest in the case, judgment may be entered against plaintiff.

(b) Briefs shall be submitted in type-written or printed form, double spaced, in at least pica or eleven-point type, on letter-size paper. Each brief shall contain an alphabetical index of cases cited therein. Without prior leave of the Trademark Trial and Appeal Board, a main brief on the case shall not exceed fifty-five pages in length in its entirety, including the table of contents, index of cases, description of the record, statement of the issues, recitation of facts, argument, and summary; and a reply brief shall not exceed twenty-five pages in its entirety. Three legible copies, on good quality paper, of each brief shall be filed.

[48 FR 23140, May 23, 1983; 48 FR 27226, June 14, 1983, as amended at 54 FR 34900, Aug. 22, 1989]

§ 2.129 Oral argument; reconsideration.

(a) If a party desires to have an oral argument at final hearing, the party shall request such argument by a separate notice filed not later than ten days after the due date for the filing of the last reply brief in the proceeding. Oral arguments will be heard by at least three Members of the Trademark Trial and Appeal Board at the time specified in the notice of hearing. If any party appears at the specified time, that party will be heard. If the Board is prevented from hearing the case at the specified time, a new hearing date will be set. Unless otherwise permitted, oral arguments in an inter partes case will be limited to thirty minutes for each party. A party in the position of plaintiff may reserve part of the time allowed for oral argument to present a rebuttal argument.

(b) The date or time of a hearing may be reset, so far as is convenient and proper, to meet the wishes of the parties and their attorneys or other authorized representatives.

(c) Any request for rehearing or reconsideration or modification of a decision issued after final hearing must be filed within one month from the date of the decision. A brief in response must

be filed within fifteen days from the date of service of the request. The times specified may be extended by order of the Trademark Trial and Appeal Board on motion for good cause.

(d) When a party to an inter partes proceeding before the Trademark Trial and Appeal Board cannot prevail without establishing constructive use pursuant to section 7(c) of the Act in an application under section 1(b) of the Act, the Trademark Trial and Appeal Board will enter a judgment in favor of that party, subject to the party's establishment of constructive use. The time for filing an appeal or for commencing a civil action under section 21 of the Act shall run from the date of the entry of the judgment.

[48 FR 23141, May 23, 1983, as amended at 54 FR 29554, July 13, 1989; 54 FR 34900, Aug. 22, 1989; 54 FR 37597, Sept. 11, 1989]

§ 2.130 New matter suggested by Examiner of Trademarks.

If, during the pendency of an inter partes case, facts appear which, in the opinion of the Examiner of Trademarks, render the mark of any applicant involved unregistrable, the attention of the Trademark Trial and Appeal Board shall be called thereto. The Board may suspend the proceeding and refer the application to the Examiner of Trademarks for his determination of the question of registrability, following the final determination of which the application shall be returned to the Board for such further inter partes action as may be appropriate. The consideration of such facts by the Examiner of Trademarks shall be ex parte, but a copy of the action of the examiner will be furnished to the parties to the inter partes proceeding.

§ 2.131 Remand after decision in inter partes proceeding.

If, during an inter partes proceeding, facts are disclosed which appear to render the mark of an applicant unregistrable, but such matter has not been tried under the pleadings as filed by the parties or as they might be deemed to be amended under Rule 15(b) of the Federal Rules of Civil Procedure to conform to the evidence, the Trademark Trial and Appeal Board, in lieu of determining the matter in the decision